

DOCUMENT RESUME

02673 - [A1732749]

[Protest That Invitation for Bids Was Restrictive of Competition and Contractor Was Nonresponsible]. B-188275. June 9, 1977. 6 pp.

Decision re: Boston Pneumatics Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Army: Army Troop Support Command; Southwest Truck Body Co.

Authority: B-184803 (1976). B-184804 (1976). B-184805 (1976). B-185339 (1976). B-186779 (1976). B-759582 (1966). B-186395 (1977). B-185000 (1976). B-186133 (1977). B-187849 (1977). 54 Comp. Gen. 66. A.S.P.R. 1-903(a) (iii).

Protester objected to the award of a contract to another bidder on the grounds that the bid invitation was restrictive of competition and that the other company was given an unfair advantage and was nonresponsible. The protest was denied because a contractor may enjoy competitive advantage by virtue of incumbency. Affirmative determination of responsibility is largely within the discretion of the procuring agency. (QM)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-183275

DATE: June 9, 1977

MATTER OF: Boston Pneumatics, Inc.

DIGEST:

1. If not result of preference or unfair action by Government, contractor may enjoy competitive advantage by virtue of incumbency.
2. GAO declines to establish rule that evaluation factors for testing over particular amount are per se unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of \$66,000 not shown to be unreasonable.
3. ASPB § 1-1903(a)(11) controls both first article testing and initial production testing.
4. Bidder's preference to work from sample or "queen bee" provides no legal basis for overturning agency's determination that specifications and drawings are adequate for procurement without it, since determination of Government's requirements and drafting specifications to meet requirements are responsibility of procuring agency.
5. Decision to grant waiver of initial production testing is matter of administrative discretion to which GAO will not object in absence of clear showing of arbitrary or capricious conduct on part of procuring officials.
6. Provision in IFB allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate.

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7. Since determination of contractor's responsibility is matter largely within discretion of procuring officials, affirmative determination of responsibility will not be reviewed in absence of allegation of fraud or that definitive responsibility criteria are not being applied.

Boston Pneumatics, Inc. (BPI), protests the award to Southwest Truck Body Company (Southwest) for the production of 181 tool trailers under invitation for bids (IFB) DAAK01-77-B-5094 issued by the Army Troop Support Command (TROSCOM).

BPI bases its protest on the following contentions:

- (1) The IFB is restrictive of competition by allowing a \$50,000 waiver of initial production testing where Southwest (the previous contractor under a similar contract) is the only contractor that could qualify.
- (2) The absence of any provision in the IFB that the Government furnish a sample or "queen bee" gave Southwest an unfair advantage as the previous producer.
- (3) Southwest cannot qualify for the waiver because the current IFB is for a product substantially different from its previous product.
- (4) Award to Southwest is improper because Southwest is not a responsible contractor.

BPI's first two arguments concern the restrictive effect of the IFB. But we have frequently held that:

"* * * certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances. * * * We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected. * * * Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the result of a preference or unfair action by the Government."

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EMSEC Service Corp., B-184803, B-184804, B-184805, January 19, 1976, 76-1 CPD 34 and cases cited therein; Field Maintenance Services Corporation, B-185339, May 28, 1976, 76-1 CPD 350; Price Waterhouse & Co., B-186779, November 15, 1976, 76-2 CPD 412.

BPI urges that the waiver is a result of a preference or unfair action by the Government. BPI refers to the amount of the waiver afforded Southwest as being the prime indicator of favoritism and unfairness. Referring to our decision cited by TROSCOM (B-159582, September 7, 1956) in which we upheld a \$6,500 evaluation factor, BPI stresses the great difference between \$6,500 and \$66,000. We decline to establish any rule that evaluation factors for testing over any particular amount are per se unreasonable. Instead, we will examine the evaluation factor to determine whether it bears a reasonable relation to the testing needs of the Government.

BPI argues that the \$66,000 cost for testing is not an accurate reflection of the Government's testing requirements and that it is really a much lower figure than \$66,000. As its first argument, BPI compares the \$66,000 with the total contract cost of approximately \$250,000 for a contract BPI had for producing 28 similar trailers in 1965. BPI shows that, at the rate of \$66,000 for two trailers, the five trailers that it submitted for testing in 1965 would now cost \$165,000 or 66 percent of the 1965 total contract price. However, aside from failing to take into consideration inflation over the last 12 years, that does not establish that the \$66,000 testing costs are unreasonable for the amount of testing required.

While the Government was to conduct the initial production testing, for which it would add the \$66,000 to the bids of those who did not qualify for a waiver, first article testing was to be conducted by the contractor. BPI alleges that the first article tests are exactly the same as the initial production tests and compares its bid price of \$24,040 and Southwest's of \$15,000 for equivalent testing to the Government's price of \$66,000. The bidders, however, are in a competitive environment which provides an incentive to minimize costs and thus may have been willing to absorb some of the first article testing costs to obtain an award. Therefore, we do not believe it is a fair comparison. However, if it were, we note that BPI's argument is based in part on the reasonableness of its \$24,040 amount for first article testing. If the \$24,040 were substituted for the Government's \$66,000 evaluation factor that would still leave Southwest as the low bidder by more than \$2,000.

TROSCOM's cost estimate for initial production testing is based on an estimated 2,000 manhours to complete the tests at a rate of

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\$13.80 per hour. Overhead at 122.5 percent of direct labor costs is also added. All of this totals \$61,410. The difference between this and the \$66,000 estimate was due to a change in rate structure from the time the original estimate was made; however, TROSCOM says that an allowance for a cost overrun due to test failures and/or test facility scheduling would make the \$66,000 very reasonable. TROSCOM bases the above rates on other tests of similar items. We find no legal basis to question the reasonableness of this estimate.

BPI objects to the inclusion of the evaluation factor in the solicitation and argues that the Armed Services Procurement Regulation (ASPR) § 1-1903(a)(iii) (1976 ed.), which would otherwise require inclusion, is inapplicable because it applies only to first article testing. However, we have previously recognized that part 19 of ASPR, entitled "First Article Approval," defines "first article" as including both preproduction models and initial production samples. Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139. Therefore, we agree with TROSCOM that ASPR § 1-1903(a)(iii) provides for the evaluation factor and controls its application in the present case.

BPI alternatively argues that the ASPR § 1-1903(a)(iii) requirements were not met. BPI questions whether a thorough study and consideration of the pros and cons was made, whether proper criteria for use of the factor were established, whether the estimate is realistic, and whether the cost estimate is adequately documented in the contract file. However, ASPR § 1-903(a)(iii) only provides that--

"If the Government is to be responsible for first article testing, the cost to the Government of such testing shall be a factor in the evaluation of the bids and proposals to the extent that such cost can be realistically estimated. This estimate shall be documented in the contract file and clearly set forth in the solicitation as a factor which will be considered in evaluating the bids or proposals."

We believe that the TROSCOM estimate detailed above and set forth in the IFB as an evaluation factor meets the requirements of the regulation.

TROSCOM's position with respect to not providing a "queen bee" is that the specifications and drawings are adequate for the procurement without it. The determination of the Government's requirements and the drafting of specifications to meet those requirements are

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responsibilities vested in the procuring activity. Boston Pneumatics, Inc., B-195000, May 27, 1976, 76-1 CPD 345. Therefore, in the circumstances, BPI's preference to work from a sample provides no legal basis for overturning the agency's determination.

BPI's allegation that a waiver of initial production testing was improperly given to Southwest is a matter of administrative discretion to which we will not object in the absence of a clear showing of arbitrary or capricious conduct. Charles J. Dispenza & Associates, B-136133, April 27, 1977, 77-1 CPD 284. Attempting to show that waiver was improper, BPI lists numerous changes in the current IFB from the 1974 model produced by Southwest. TROSCOM points out that the changes in specifications listed by BPI are irrelevant because Southwest has worked more recently under a 1976 contract essentially identical to the current IFB specifications. BPI alleges that the more recent contract could not provide a basis for evaluation for the waiver in the present IFB because it is unlikely that the more recent product has been tested. BPI points out that Southwest's product under the 1976 contract was not tested either as a first article or under initial production testing. BPI then questions whether any item under the 1976 contract has yet been delivered, but TROSCOM informs us that it has accepted delivery on the units under the 1976 contract through its quality assurance representative. In that connection, section I-3-f of the IFB provides for waiver of the requirement for initial production testing if an offeror "has previously produced an essentially identical item." The section does not require the previously produced item to have been tested as a first article or under initial production testing. Since an essentially identical product was produced under the 1976 contract, this justifies TROSCOM's waiver. Therefore, the waiver has not been clearly shown to be arbitrary or capricious conduct by TROSCOM.

Concerning BPI's final argument that Southwest is not a responsible contractor, this Office does not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Although we will consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of the contractor's inability to perform. Irvin Industries, Inc., B-187849, March 28, 1977, 77-1 CPD 217.

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The protest is accordingly denied.

R. Z. Kiffin
Deputy Comptroller General
of the United States